



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
525 NE Oregon Street
PORTLAND, OREGON 97232-2737

OCT 9 2003

MEMORANDUM FOR: D. Robert Lohn
Regional Administrator

FROM: *Robert G. Walton*
Robert G. Walton, Assistant Regional Administrator
Salmon Recovery Division

SUBJECT: A Tribal Resource Management Plan Provided by the Nez Perce
Tribe affecting Snake River Spring/Summer Chinook Salmon in the
Imnaha River in 2003 Under the Endangered Species Act, Tribal
4(d) Rule (July 10, 2000; 65 FR 42481) - **DECISION**
MEMORANDUM.
Tracking Number: NWR/4d/14/2003/001

ISSUE

The Nez Perce Tribe submitted a Tribal Resource Management Plan (TRMP) for Snake River spring/summer chinook salmon in the Imnaha River sub-basin for review under the Tribal 4(d) Rule on March 26, 2003 (NPT 2003). The scope of the TRMP includes tribal and non-tribal fisheries in the Imnaha River subbasin in 2003 only. Management of the fisheries and evaluation of fishery impacts occur in the context of artificial propagation activities in the subbasin addressed elsewhere. Activities described in the TRMP include the allocation of adult salmon returns to brood stock collection, natural spawning escapements, and harvest. Harvest is proposed in ceremonial and subsistence fisheries managed by the tribe and recreational fisheries managed by the State of Oregon Department of Fish and Wildlife (ODFW) which incorporate conditions for the conservation and restoration of salmon stocks.

The TRMP describes hatchery operations and harvest that affect the Imnaha River population of spring chinook salmon which is included in the threatened Snake River Spring/Summer Chinook Salmon Evolutionarily Significant Unit (ESU). Tribal resource managers cooperate with the Oregon Department of Fish and Wildlife in management of the chinook salmon resource, including artificial propagation, monitoring and evaluation, and harvest management in the Imnaha basin. The TRMP describes both the activities that are principally conducted by the Tribal government and the activities that are principally conducted by the State, through cooperative agreements. This TRMP is within the regulatory definition of "Tribal Resource Management Plans" in the Tribal 4(d) Rule (50 CFR 223.209(b)(1)). As per the Tribal 4(d) Rule, NMFS consulted regularly with the Tribe during development of the TRMP to provide guidance on activities to be covered under the Tribal 4(d) Rule and to exchange information and discuss what would be needed to provide for the conservation of the listed species.

Included in the actions proposed by the TRMP are tribal and state fisheries which would harvest approximately 418 adult and jack chinook salmon. The harvest proposal is based on a 10% impact on a total return that has been estimated at 4,175 fish, which results in an estimated 5.7% harvest rate on natural fish. The analysis provided in the attached "Evaluation and Pending Determination" document concludes that the proposed harvest will not impede attainment of brood stock collection goals and supplemental releases of fish for natural spawning while still allowing a projected return of over 1,378 adult and jack naturally produced spring chinook, the 2nd greatest return to the Imnaha River since listing under the ESA.

RECOMMENDATION

NMFS' Salmon Recovery Division (NMFS-SRD) evaluated the TRMP provided by the Nez Perce Tribe and finds that it adequately addresses all of the requirements of the Tribal 4(d) rule, including that it does not appreciably reduce the likelihood of survival and recovery of listed species that may be affected by the plan. NMFS-SRD recommends that the Regional Administrator make a determination that the take limitations of the Tribal 4(d) Rule apply to the Nez Perce Tribe's TRMP for Snake River spring/summer chinook salmon in the Imnaha River subbasin in 2003, provided that it is implemented in accordance with the implementation terms at the end of this memo.

BACKGROUND

In April, 1992, the National Marine Fisheries Service (NMFS) listed Snake River spring/summer and fall chinook as threatened under the Endangered Species Act (ESA)(April 22, 1992, 57 FR 14653). On July 10, 2000, NMFS issued a final ESA 4(d) Rule adopting regulations necessary and advisable for activities conducted under tribal resource management plans (TRMPs) (65 FR 42481, July 10, 2000 [50 CFR 223.209]). This rule created a limitation on the ESA section 9 take prohibitions for TRMPs where the Secretary of Commerce (Secretary) has determined that implementing the TRMP will not appreciably reduce the likelihood of survival and recovery for the listed species. The best available information is used to determine the TRMP's impact on the biological requirements of the species and the determination will be consistent with legally enforceable Tribal rights and with the Secretary's trust responsibilities to the Tribes.

The purpose of the Tribal 4(d) Rule is to establish a process whereby the conservation needs of listed species are met while respecting Tribal rights, values, and needs and not cause an abridgement of any treaties, rights, executive orders, or statutes. The rule recognizes the Secretary's trust responsibilities to the Tribes and reinforces the commitment to government-to-government relations as expressed in Secretarial Order 3206. The rule also requires the Secretary, in consultation with the Tribes, to use the best available scientific and commercial data (including any Tribal data and analysis) to determine the TRMP's impact on the biological requirements of the species.

The TRMP clearly defines its scope as addressing only the Imnaha River population of the Snake River Spring/Summer Chinook Salmon ESU, during the time that it is in the Imnaha River

sub-basin as returning adult fish, in 2003. The TRMP addresses the allocation of adult salmon among needs for natural spawning, brood stock for an artificial propagation program designed to aid in recovery of this population, release of adult spawners into under-utilized spawning habitat within the Imnaha River sub-basin, and harvest.

Hatchery brood stock numbers and composition and the number of adult salmon available for supplemental releases in under-utilized habitat within the basin are established by agreements developed under *U.S. v. Oregon* and an Annual Operating Plan (AOP) (ODFW 2002) for the artificial propagation program. Under current hatchery operations, brood stock collection, and natural spawning escapement and composition are adjusted in accordance with a sliding scale that addresses the interannual variation in total run size and proportion of natural and hatchery-origin fish. Fisheries harvest objectives are developed to utilize a portion of the return after the hatchery and natural spawning escapements have been achieved. The management objective is to conduct fisheries in a manner that does not appreciably reduce the likelihood of survival and recovery of listed chinook salmon. Performance indicators include dam, weir and redd counts, harvest estimates and escapement goals. The proposed TRMP provides the framework through which the tribal jurisdiction can implement salmon fisheries while meeting requirements specified under the ESA.

As a result of *U.S. v. Oregon* dispute resolution in 1993, the Nez Perce Tribe and the State of Oregon Department of Fish and Wildlife (ODFW) cooperatively developed a management plan for restoration of Imnaha River spring/summer chinook, using the indigenous stock of Snake River spring/summer chinook in the Imnaha hatchery program. The management plan was submitted to National Marine Fisheries Service (NMFS) in an ESA Section 10 Permit application in 1998 (ODFW 1998). In response to the application from ODFW, NMFS issued section 10 (a)(1)(A) permit 1128 (NMFS 2000). The objectives for the permitted actions, as listed in the permit are: (1) Restore the natural populations of chinook salmon in the Imnaha River basin to ESA delisting levels, (2) reestablish traditional tribal and recreational fisheries for chinook salmon, (3) maintain the genetic and life history characteristics of the endemic wild population while pursuing mitigation goals and management objectives, and (4) operate the hatchery program to ensure that the genetic and life history characteristics of the hatchery fish mimic the wild fish.

The TRMP includes provisions for monitoring and evaluation to assess fishing-related impacts to Snake River spring/summer chinook salmon, and incorporates the Annual Operating Plan for the Imnaha River chinook enhancement and research project which monitors the abundance of naturally spawning fish, and allocates fish to artificial propagation brood stock and supplemental adult out plants. The TRMP only applies to the unique conditions in 2003. Information gathered in 2001, 2002, and 2003 fishery monitoring and evaluation will be used (by NMFS and the co-managers) in future years to assess whether impacts to listed fish are as expected, and to develop longer-term planning.

DISCUSSION

Controversial Issues:

No controversy is expected. The fishery proposed in 2003 is essentially identical to the fishery conducted in 2001 and 2002, and NMFS' decision to accept the NPT TRMP has essentially the same basis. No controversy, litigation, or potential litigation resulted from the fishery conducted in 2001 or 2002.

The TRMP explicitly calls for harvest directed on listed Snake River spring/summer chinook salmon. As a result of hatchery management for many years in the Imnaha River, all hatchery-origin fish of this program have had at least one listed parent and are therefore themselves listed. The ability to manage fishery programs based more firmly on the biological status of the local population, rather than strictly on listed status, is the basis of the Tribal 4(d) Rule. As described in this memorandum, in the attached evaluation, and in the TRMP itself, proposed harvest levels are not expected to substantially reduce the large return of spring/summer chinook to the Imnaha River in 2003 and goals for natural spawning escapement, hatchery broodstock, and supplemental outplanting of adults for natural spawning in under-used habitat will be met after harvest. Therefore, any potential controversy on this topic will not be as a result of estimated impacts to the natural population's prospects for survival and recovery, but instead will be based more a perception that listed fish should not be harvested in any case.

The Nez Perce Tribe and the State of Oregon cooperatively manage spring/summer chinook salmon in the Imnaha River subbasin.

Public Review and Comment:

NMFS published notice of its proposed evaluation and pending determination of the TRMP on July 1, 2003 (68 FR 39067). The public comment period closed on July 16, 2003. NMFS received no comments from the public. NMFS has received no comments from the co-managers nor any new information, and no issues were raised which required modifying the proposed evaluation and recommended determination.

Evaluation of TRMP under the ESA 4(d) Rule:

Attached is NMFS' evaluation of whether the TRMP meets the fundamental standard of the ESA, which is repeated in the Tribal 4(d) rule, of not appreciably reducing the likelihood of survival and recovery of listed species. In evaluating the fisheries proposed under the Nez Perce TRMP for the Imnaha River sub-basin chinook salmon, NMFS compared the TRMP to the standards under limits (4) and (6) of the all-species 4(d) rule(65 FR 42422) which were developed to assure that state and joint-state tribal fisheries plans meet this same fundamental standard.

Implementation Terms:

The TRMP provided by the NPT includes a description of planned fisheries and certain monitoring and reporting requirements. Actions taken under the NPT TRMP qualify for the limitation on application of take prohibitions provided by the Tribal 4(d) Rule, provided that the following actions are implemented:

1. The co-managers will conduct the management activities, including fisheries, in accordance with the TRMP submitted by NPT, including the terms of the Annual Operating Plan and section 10 permit which were incorporated by reference. Each co-manager is responsible for the actions of any individual operating under his/her specific take authorization.
2. Weekly assessments of the amount of fishing effort and harvest, the abundance and composition of the chinook salmon return and the attainment of escapement goals and harvest quotas will be developed and provided to NMFS as described below.
3. ESA-listed species will be taken only by the means, in the areas, and for the purposes set forth in the TRMP, as limited by the conditions and requirements in this determination.
4. Each co-manager will coordinate and openly share data with other co-managers to ensure that no unnecessary duplication or adverse cumulative effects to ESA-listed species occur as a result of his/her activities.
5. NMFS employee(s), or any other person(s) designated by NMFS, will be allowed to accompany field personnel during the activities provided for in this authorization. Co-managers will allow such person(s) to inspect their records and facilities if such records and facilities pertain to ESA-listed species addressed by this TRMP or NMFS' responsibilities under the ESA.
6. NMFS may amend the provisions of this authorization after reasonable notice to the NPT and the cooperating co-managers. The application of the Tribal 4(d) rule take limitation ceases to be in force or effect if provisions of the TRMP are amended without prior evaluation by NMFS.
7. Weekly assessments of the amount of fishing effort and harvest, the abundance and composition of the chinook salmon return, and the attainment of escapement goals and harvest quotas will be developed. Summaries of the weekly assessments will be submitted to NMFS (see address below).
8. Fishery activities will cease if any activity conducted under the TRMP exceeds the level of take described in the TRMP, or if circumstances indicate that such an event is imminent. Such take will be reported to NMFS as soon as possible, but no later than one week after the take objective is exceeded. A written report will then be submitted to

NMFS describing the circumstances of the take. The techniques used will be re-evaluated and revised accordingly to prevent further injury or death of listed species. Pending review of these circumstances, NMFS may suspend activities under the TRMP or amend this determination.

9. In order to effectively assess performance of the TRMP in 2003, and to facilitate planning and implementation of fisheries in future years, the NPT will provide a detailed description of the actual take of ESA-listed species that occurred under this Plan, fishing effort, harvest numbers and final spawning escapement and brood stock collection. This report will be provided to NMFS prior to December 1, 2003.

Reports should be submitted to Herb Pollard, Salmon Recovery Division, NMFS, 10215 W. Emerald Street, Suite 180, Boise, ID, 83704, no later than December 1, 2003.

REEVALUATION CRITERIA

NMFS will reevaluate this determination if: (1) the quota for incidental harvest of listed fish is exceeded; (2) the actions described by the TRMP are modified in a way that causes an effect on the listed species that was not previously considered in NMFS' evaluation; (3) new information or monitoring reveals effects that may affect listed species in a way not previously considered; or (4) a new species is listed or critical habitat is designated that may affect NMFS' evaluation of the TRMP.

SUMMARY

NMFS-SRD concludes that the TRMP for Imnaha River spring/summer chinook salmon in 2003 provided by the Nez Perce Tribe adequately addresses the requirement for a TRMP under the Tribal ESA 4(d) Rule and will not appreciably reduce the likelihood of survival and recovery of the Snake River spring/summer chinook salmon ESU. NMFS-SRD recommends that the ESA take limitation of the Tribal 4(d) Rule apply to the implementation of the TRMP provided that activities conducted under the TRMP are in compliance with the Implementation Terms described above. "Compliance" is intended to mean adherence, by each of the co-managers, to the guidelines, mandates and performance standards of the TRMP, including adoption of any necessary rules to implement their responsibilities under the plan. All sampling, monitoring, assessment, evaluation, enforcement and reporting tasks or assignments related to harvest management in the TRMP shall be conducted by the co-managers as required in the TRMP.

ENVIRONMENTAL ASSESSMENT

As described in the Tribal 4(d) Rule (65 FR 42481), any plans determined to come within this Rule must be evaluated under NEPA prior to that determination. Accordingly, the NMFS-SRD prepared an environmental assessment (EA) for this action. The EA and a Finding of No Significant Impact (FONSI), signed by W.T. Hogarth (NOAA Fisheries) with concurrence by NOAA's Office of Strategic Planning, are attached.


ESA SECTION 7/MAGNUSON-STEVENSON ACT EFH CONSULTATION

NMFS initiated consultation with itself under ESA section 7 on March 26, 2003, and determined that making the recommended determination would not jeopardize the continued existence of listed Snake River spring/summer chinook salmon or Snake River Basin steelhead.

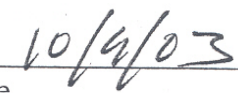
NMFS also evaluated the potential effects of its proposed recommendation on Essential Fish Habitat under the Magnuson-Stevens Act and determined that the implementation of the Plan might result in adverse affect based on local and transitory interference with migration due explicitly to fishery activity. Accordingly, NMFS provided conservation recommendations in the form of the conservation measures described in the TRMP and the proposed evaluation/recommended determination document. Pursuant to the MSA (§305(b)(4)(B)) and 50 CFR 600.920(j), Federal agencies are required to provide a detailed written response to NMFS' EFH conservation recommendations within 30 days of receipt of these recommendations. Concurrence with this section 4(d) recommendation shall constitute sufficient NMFS acknowledgment of its own conservation recommendations.

DETERMINATION

1. I have determined that implementation of the TRMP for Imnaha River spring chinook salmon in 2003, submitted by the Nez Perce Tribe, *will not* appreciably reduce the likelihood of survival and recovery of the Snake River spring/summer chinook salmon ESU provided that it is implemented in accordance with the Implementation Terms described above.



D. Robert Lohn
Regional Administrator



Date

2. I have determined that implementation of the TRMP for Imnaha River spring chinook salmon in 2003, submitted by the Nez Perce Tribe, *will* appreciably reduce the likelihood of survival and recovery of the Snake River spring/summer chinook salmon ESU.

D. Robert Lohn
Regional Administrator

Date

Attachment 1: Evaluation and Recommended Determination Document

Attachment 2: Environmental Assessment/FONSI

Attachment 3: ESA Section 7/Magnuson-Stevens Act EFH consultation

bcc: Herb Pollard
Misty Shafte
Gloria Matthews

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